IN THE
SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-468

IN-CHO CHUNG,

Petitioner,

v.

LAWRENCE PARK, Individually and as President of Mansfield State College, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appleas for the Third Circuit entered in the above entitled case on June 6, 1975.

CITATIONS TO THE OPINIONS BELOW.

The opinion of Judge Muir holding that petitioner had tenure appears in Appendix A, *infra*, and is reported in 369 F. Supp. 959. Judge Muir's decision that petitioner was not denied due process appears in Appendix A, *infra*, and is reported in 377 F. Supp. 524.

The opinion of Judge Adams of the Third Circuit Court of Appeals affirming Judge Muir, appears in Appendix A, *infra*, and is reported in 514 F. 2d 382.

JURISDICTION.

The judgment of the Circuit Court of Appeals is dated April 11, 1975 and was entered on June 6, 1975. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

STATUTES INVOLVED.

The federal statutes involved are 42 U. S. C. §§ 1983 and 1985, as is the Fourteenth Amendment to the Constitution.

QUESTIONS PRESENTED.

1. Whether the District Court erred in concluding that petitioner's hearing satisfied due process requirements where the decision to terminate petitioner was made before the hearing; where the grounds of his dismissal were only vaguely stated in the notice; where the burden of proof at the hearing was placed on Dr. Chung, contrary to the College's Tenure Policy; where petitioner was denied an opportunity to confront and cross-examine adverse witnesses by reason of the fact that the burden of proof was on him; and where no written statement by the factfinders as to the evidence relied upon was ever issued. The Third Circuit Court of Appeals affirmed.

2. Whether the District Court erred in concluding that ". . . . by agreeing to . . . . and participating fully . . . . at the Duvall Hearing, he (Dr. Chung) waived objections to the hearing," *Chung v. Park*, 377 F. Supp. 524

at 530 (1974), where petitioner objected to the hearing generally, and to the scope and burden of proof specifically and where, had petitioner not participated in the hearing, he would have been barred from subsequently challenging the College for failing to provide him with a hearing. The Third Circuit Court of Appeals affirmed.

3. Whether the District Court erred in concluding that ". . . the conduct of the hearing was in substantial compliance with the college tenure policy", Id., where Dr. Chung and not the College bore the burden of proof; where the College did not follow its own procedure of dismissing a professor before the fourth or fifth years or dismissing during one of those years with an appropriate hearing; where, although the tenure rules of the College require the hearing panel to consider the totality of a professor's qualifications and fitness as a teacher, in Dr. Chung's case the question was narrowed to whether the latest evaluations of him, after the parties had become polarized in animosity, were enough to show that the decision to dismiss was not arbitrary, capricious and discriminatory. The Third Circuit Court of Appeals affirmed.

STATEMENT.

This is a civil rights action brought by a college professor against the president of a college and others, on the grounds that he was dismissed from his tenured position on the faculty in violation of his due process rights under the Fourteenth Amendment to the United States Constitution.

Appellant, In-Cho Chung, was employed as a Professor of Biology at Mansfield State College, Mansfield, Pennsylvania, from September 1, 1967 through June 1972. After he was notified on December 6, 1971, that his reappointment for the 1972-73 academic year would not be recommended by Dr. Park, Dr. Chung reluctantly agreed to participate in a hearing before the Duvall Panel which concluded that Dr. Park's decision was not arbitrary, capricious or discriminatory.

On July 9, 1973, Dr. Chung filed a complaint in the United States District Court for the Middle District of Pennsylvania based on 42 U. S. C. §§ 1983 and 1985, alleging that the college had not followed its own rules and procedure in dismissing him and thereby deprived him of his property without due process of law. Dr. Chung demanded reinstatement to his former position, a permanent injunction enjoining respondents from interfering with his constitutionally protected right to remain in his position of employment unless just cause for his dismissal could be shown, compensatory and punitive damages, and such other relief as the Court deemed necessary. Jurisdiction was based on Title 28 of the United States Code, Sections 1331 and 1343.

The District Court ruled in an Opinion by Judge Muir that Dr. Chung was a tenured professor at the time of his dismissal, that the college substantially complied with its own policies at the hearing, and that Dr. Chung

was not deprived of his right to due process of law at the hearing.

The Third Circuit Court of Appeals affirmed in an opinion by Judge Adams in which he held that Dr. Chung waived his right to a hearing that complied with the College's rules by agreeing to the Duvall hearing; that due process did not require that Dr. Chung be given a hearing before the decision to terminate his employment was made or that the college bear the burden of proof at the hearing; and that in deciding what process was "due," the Court should "weigh the professor's interest in avoiding an unreasonable termination against the college's interest in having an efficient process for identifying and ridding itself of incompetent faculty members." *Chung v. Park*, 514 F. 2d 382 at 386.

REASONS FOR GRANTING THE WRIT.

The opinions of the District Court and the Circuit Court below make a travesty of this Court's decisions in cases involving the question of when termination hearings meet due process requirements.

1. Although the facts in this case are that Dr. Chung received only the most general and superficial explanation of the grounds for his termination and disclosure of supporting evidence prior to his hearing (Appendix C), nevertheless the Circuit Court held that Dr. Chung's hearing satisfied the due process requirement of "written notice of the ground for termination" (*Chung v. Park*, 514 F. 2d 382 at 386) without even deciding whether Dr. Chung was entitled to such notice. The District Court ruled that "Dr. Chung received a hearing which comported with the bare minimia of due process," *Chung v. Park*, 377 F. Supp. 524 at 529, citing *Morrisey v. Brewer*, 408 U. S. 471, (1972).

Petitioner believes that as a matter of law the due process requirements of written notice of the grounds for termination and of an opportunity to defend are not met by the letter he received (Appendix B) vaguely referring to "recommendations," "concerns" and "problems." Yet this was the only "notice" as to the grounds for his termination Dr. Chung received prior to his hearing, and he was forced to prepare his defence on such notice.

2. Both Courts below held that Dr. Chung's hearing satisfied due process when in fact Dr. Chung was notified that his employment had been terminated before the hearing was held. Moreover, the burden of proof at the hearing was on Dr. Chung to prove that his dismissal was arbitrary, capricious or discriminatory.

At Dr. Chung's hearing, disclosure of the evidence supporting his termination as required by *Morrisey* (*supra*) and *Goldberg v. Kelly*, 297 U. S. 254 (1970) occurred only in the sense that witnesses testifying on behalf of the college attempted to refute the evidence offered by Dr. Chung who bore the burden of proof. In this way, Dr. Chung was denied his right to have the college disclose any evidence it had to support his termination.

Instead, Dr. Chung, who was at the time a tenured professor, was required to prove by a preponderance of the evidence that his dismissal was arbitrary, capricious or discriminatory. Clearly, such ground rules do not facilitate but instead frustrate the purpose of such a hearing which is to "inform the professor of the grounds for his non-retention and to allow him to challenge their sufficiency." *Chung v. Park*, 514 F. 2d 382 at 387, citing *Perry v. Sindermann*, 408 U. S. 593 (1972).

Shifting the burden of proof from the college to Dr. Chung had the effect of requiring Dr. Chung to carry a much greater burden of persuasion to retain his position than he would have had to carry had the hearing been held according to the rules set forth in the College's Tenure Policy.

Under the special rules of petitioner's hearing, Dr. Chung was required to prove by a preponderance of the evidence that Dr. Park was aribtrary, capricious or discriminatory in thinking that he (Dr. Chung) was incompetent. Merely proving that he was a competent professor would not have been enough. Dr. Chung was required to prove additionally that the opinions of Dr. Park and the members of the Board of Trustees that he was incompetent was arbitrary, capricious or discrimintory.

It is not surprising that Dr. Park failed to carry this burden.

3. The District Court erred in concluding that Dr. Chung waived objections to the differences between his hearing and that afforded other tenured professors, by agreeing to and participating in the hearing when in fact he objected to the hearing in general and to the shifted burden of proof specifically, and when, had he not participated in the hearing he would have been barred from subsequently challengingly the college for failure to provide him with a hearing. *Hayes v. Cape Henlopen School District*, 341 F. Supp. 823 (1972).

If the District Court's ruling on this point is correct, then Dr. Chung's only choice was to either accept a hearing lacking due process safeguards or to refuse to accept the hearing at all and thereafter be barred from challenging his dismissal on the grounds that he was not afforded a hearing.

Under the circumstances, Dr. Chung would have been dismissed without due process of law regardless of which alternative he chose.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

MARTIN M. FINE,
FINE, EISENBEIS & FELIX,
Attorneys for Petitioner.

APPENDIX A.

IN-CHO CHUNG,

Plaintiff,

v.

LAWRENCE PARK, INDIVIDUALLY AND AS PRESIDENT OF MANSFIELD STATE COLLEGE, ET AL.,

Defendants.

Civ. No. 73-371.

United States District Court,
M. D. Pennsylvania.

January 30, 1974

As Amended February 27, 1974.

Martin M. Fine, Williamsport, Pa., for plaintiff.

Robert Nagel, Mark Widoff, Dept. of Justice, Harrisburg, Pa., for defendants.

Opinion.

MUIR, *District Judge*.

I. INTRODUCTION.

Plaintiff In-Cho Chung brought this civil rights action under 42 U. S. C. § 1983 alleging that the Defendant college officials terminated his employment at Mansfield State College in violation of his constitutional rights. Pro-

fessor Chung claims that he possessed a contractual right to continuous employment under the College's Tenure Policy which was violated when his employment was terminated without an adequate hearing and that thus, Chung was denied "due process of law" under the 14th Amendment to the federal Constitution. Chung also claimed a deprivation of liberty without due process based upon an asserted restriction on his right to free speech. The free speech claim was eliminated as an issue in this Court's opinion on Defendants' motion to dismiss on September 18, 1973. A three-day trial followed on the sole issue of Plaintiff's right to a due process hearing, leaving for later determination the question of the sufficiency of the due process hearing afforded Plaintiff.

After hearing all the evidence and argument of counsel at trial, and upon consideration of all the files, records and briefs, the Court makes the following findings and conclusions.

II. Findings of Fact.

1. Mansfield State College is an educational institution funded and operated by the Commonwealth of Pennsylvania (Pa. Public School Code, 1970, Feb. 17, P. L. ——, No. 13, 24 P. S. § 20-2001 et seq.).

2. Under college regulations and practice, the departmental chairman, the divisional dean, and the academic vice-president recommended to the President and the Board of Trustees grant or denial of tenure and this procedure was known to Plaintiff during his employment at the college. (Tr. Vol. 1, p. 127; Vol. 2, p. 150; Vol. 3, pp. 17, 114, 117, 131; R-1).

3. The President did not uniformly follow the tenure recommendations of the departmental chairman. (Tr. Vol. 3, pp. 175-178).

4. The responsibility for determining the method of teacher evaluation for tenure purposes was left to the departmental chairman and varied from department to department. (Tr. Vol. 3, pp. 118-119; Vol. 2, p. 75).

5. When Plaintiff was hired, he received a copy of the Faculty Manual containing the College procedure for deciding tenure questions. (Tr. Vol. 1, p. 103).

6. Plaintiff is an adult citizen of the Commonwealth of Pennsylvania, residing in Mansfield, Pennsylvania. (Tr. Vol. 1, p. 97).

7. Defendant Lawrence Park is President of Mansfield State College. (Vol. 3, p. 116).

8. Park is a resident of the Commonwealth of Pennsylvania residing in Mansfield, Pennsylvania. (Tr. Vol 3, p. 116).

9. Defendant Edward Gassner was at all times pertinent to this case, Chairman of the Biology Department of the Mansfield State College and resided in Wellsboro, Pennsylvania. (Tr. Vol. 3, p. 17).

10. Gassner became chairman of the Department of Biology at Mansfield State College in July, 1970. (Tr. Vol. 3, p. 16).

11. Defendant Sylvester Schmitz was Vice President for Academic Affairs of Mansfield State College after 1968 and is a resident of the Commonwealth of Pennsylvania residing in Mansfield, Pennsylvania. (Tr. Vol. 3, pp. 58, 88).

12. Charles Holmes was at all times pertinent to this case, Dean of the Division of Arts and Sciences of Mansfield State College, and resides in Havre, Montana. (Complaint, ¶ 5(c); Answer ¶ 2).

13. On or about January, 1967, Dr. Newelle Schappelle, Chairman of the Biology Department of Mansfield State College until the academic year starting in the fall of 1970, was instructed by the President of Mansfield State College to obtain the services of an instructor of Biology with professorial status; that is, a Doctorate of Biology and at least seven years, teaching experience. (Tr. Vol. 2, pp. 45, 46; Vol. 3, p. 16).

14. On or about February, 1967, Plaintiff applied for employment at Mansfield State College, Mansfield, Pennsylvania. At that time Plaintiff held a Doctorate in Plant Biolgoy from the University of Michigan and had eleven years of teaching experience in that subject. (Tr. Vol. 2, pp. 98-102).

15. After travelling to Mansfield State College for numerous interviews, Plaintiff was orally offered a position as Professor of Biology at Mansfield State College by Defendant Sylvester Schmitz, then serving as Dean of the College, and Dr. Newelle Schappelle, Chairman of the Biology Department. (Tr. Vol. 1, pp. 105-107).

16. On April 5, 1967, Plaintiff received written confirmation of this offer from Fred E. Bryn, then President of Mansfield State College. (Complaint, Exhibit #2).

17. On September 1, 1967, after having orally accepted the offer of employment, Plaintiff entered into his duties as a Professor of Biology at Mansfied State College. (Complaint, ¶ 13; Answer ¶ 9).

18. Plaintiff was employed for three academic years between 1967 and 1970 on a year-to-year, probationary status, and he understood his status to be probationary during that period of time. (R-1; R-23, exhibits "A", "B", and "C" of the Complaint, Tr. Vol. 1, pp. 103, 114-116; 133-134).

19. At the time Plantiff was hired, Defendants indicated that Plaintiff could expect his employment to continue as long as his performance remained satisfactory. (Tr. Vol. 1, pp. 105-108).

20. In the course of his duties as Departmental Chairman, Dr. Schappelle received student complaints about Plaintiff's grading practices and his diction which rendered his lectures incomprehensible. (Tr. Vol. 2, pp. 48-49).

21. Prior to Plaintiff's fourth year of probationary employment, Dr. Schappelle discussed student complaints with Plaintiff. (Tr. Vol. 2, pp. 78-82).

22. Prior to Plaintiff's fourth year of probationary employment, Dr. Schappelle informed Plaintiff that if he could not draw students he might not be needed by the college. (Tr. Vol. 2, p. 79).

23. On May 14, 1970, Dr. Schappelle recommended to President Park that Plaintiff's probationary status be extended for two academic years and that formal student evaluations of Plaintiff's teaching effectiveness be obtained. (Tr. Vol. 2, pp. 67, 78, 83; R-9).

24. Prior to Plaintiff Chung's fourth year of probationary employment, Dr. Schmitz discussed with Plaintiff student complaints about his grading practices and classroom presentation and informed him that there was a chance he could secure tenure if he made the necessary improvements. (Tr. Vol. 3, pp. 96-97, 101, 112-114; cf. pp. 107-111).

25. By letter dated January 12, 1970, Defendant Park offered Plaintiff a fourth year of probationary employment and notified Plaintiff of three so-called "concerns" upon which the decision to extend the probationary period was based. (R-10).

26. Defendant Park expressed the so-called "concerns" to Plaintiff by the letter dated January 12, 1970 in the following language:

> "(1) There are reports by some students that they have difficulty understanding your presentation through language barriers.
>
> "(2) There are disappointing enrollments in upper level elective courses you teach. The feeling is that this fact is related to the first concern.
>
> "(3) We expect to have a new Chairman of Biology, and in view of the questions raised above, we feel it is appropriate for the new person to have a role in evaluating your services to the College before a tenure decision is made." (R-10).

27. By letter dated February 11, 1970, Plaintiff attempted to refute the "concerns" expressed by Defendant Park. (R-10; R-23; Tr. Vol. 1, pp. 133-134).

28. By letter of February 11, 1970, Plaintiff accepted the offer of a fourth year of employment. (R-23).

29. On May 23, 1969, Dr. Charles Weed, the acting Chairman of the Biology Department, wrote a derogatory evaluation of Plaintiff's teaching techniques. (R-5).

30. Soon after Plaintiff received Defendant Park's offer of a fourth year of probationary employment, Dr. Holmes, the Dean of the Division of Arts and Sciences, showed Plaintiff a summary of Dr. Weed's negative evaluation. (Tr. Vol. 1, pp. 141-142).

31. Among the criticisms made in the Weed evaluation shown to Plaintiff were criticisms of classroom techniques and of Plaintiff's inability to communicate effectively with students because of a language barrier. (Tr. Vol. 1, p. 145).

32. In October of 1970, during Plaintiff's fourth year of employment, the new departmental Chairman, Defendant Gassner, convened a Department Tenure Committee to assist him in preparing recommendations on the questions of tenure for Plaintiff and two other probationary professors. (Tr. Vol. 2 pp. 111, 119, 132; Vol. 3, p. 19).

33. The Departmental Tenure Committee made no efforts to conduct a thorough evaluation of Plaintiff. (Tr. Vol. 2, pp. 125-127).

34. On October 26, 1970, the Departmental Tenure Committee recommended to Defendant Gassner that he recommend that Plaintiff be given tenured status beginning September, 1971. (C-6; Tr. Vol 2, p. 118).

35. During the fall of 1970, Plaintiff asked Defendant Gassner whether he was going to be recommended for tenure and explained that he was considering purchasing a local drug store. (Tr. Vol. 1, pp. 117-118).

36. Defendant Gassner replied that he could not advise Plaintiff on the purchase of a drug store and that he himself could see no problem in recommending Plaintiff for tenure. (Tr. Vol. 1, pp. 118, 129-131; Vol. 3, pp. 20, 33).

37. After the conversation described in paragraphs 35 and 36, *supra*, Defendant Gassner received student complaints relating, *inter alia*, to Plaintiff's teaching abilities and practices. (Tr. Vol. 2, p. 131; Vol. 3, pp. 21, 45).

38. Defendant Gassner arranged to have the students present their complaints directly to members of the Departmental Tenure Committee in November or early December, 1970. (Tr. Vol. 2, pp. 132, 133).

39. On December 10, 1970, Defendant Gassner recommended to Dr. Holmes that Plaintiff be offered a

fifth year of probationary employment. (Tr. Vol. 3, pp. 20, 21, 69, 70; R-48).

40. On January 15, 1971, Defendant Park offered Plaintiff a fifth year of probationary employment, citing the concerns of the new departmental chairman with respect to the quality of Plaintiff's classroom teaching and citing the need for further evaluation of Plaintiff's teaching effectiveness. (R-15).

41. During the fall of 1970, Defendant Gassner attempted to develop a set of student evaluation forms to be used in evaluating Plaintiff, as well as other non-tenured professors in the department. (Tr. Vol. 3, pp. 19, 22, 47, 48, 56, 57; R-25).

42. On January 5, 1971, Defendant Gassner requested that the Plaintiff distribute the evaluation forms to his class on the following Thursday and that the students be instructed to return the forms directly to Defendant Gassner's Office. (Tr. Vol. 3, pp. 25-26; Vol. 1, p. 154).

43. Plaintiff did not distribute the evaluation forms to his students at any time. (Tr. Vol. 1, pp. 166-168; Vol. 3, pp. 26, 28).

44. On January 25, 1971, Plaintiff met with Defendant Gassner and asked: (1) to be recommended for tenure; and (2) whether Gassner still wanted to receive the student evaluation forms. (Tr. Vol. 3, pp. 27, 28).

45. On January 25, 1971, Defendant Gassner reminded Plaintiff: (1) of Defendant Park's decision of January 15, 1971 that Plaintiff should be employed on a fifth year probation for purposes of further evaluation, and (2) of Defendant Gassner's prior request for a return of the student evaluation forms. (Tr. Vol. 3, pp. 27-28; R-15).

46. On January 29, 1971, Plaintiff again requested that he be recommended for tenure and Defendant Gassner again asked for the student evaluation forms. (Tr. Vol. 3, p. 28).

47. Defendant Gassner never received the student evaluation forms from Plaintiff's students or from Plaintiff. (Tr. Vol. 3, p. 28; Vol. 1, p. 168).

48. By letter dated April 1, 1971, Plaintiff protested the offer of a fifth year of probation and requested that Defendant Park employ "proceedings available to the College Administration for a fair objective determination of whether or not I am entitled to tenure at this time." (C-52).

49. During the fall of Plaintiff's fifth year of employment (1971-1972), Defendant Gassner and Defendant Holmes met to determine a method of evaluating Plaintiff. (Tr. Vol. 3, pp. 30, 31).

50. By September 23, 1971, Plaintiff had refused the Chairman of his Department and his divisional dean entrance to his classes for purposes of evaluating his teaching effectiveness. (R-28; Tr. Vol. 1, pp. 171, 175-177); see also Vol. 2, pp. 16-30).

51. By letter dated September 29, 1971, Plaintiff refused to permit the departmental chairman or divisional dean "any role in the tenure approval." (R-29; Tr. Vol. 2, p. 37).

52. On November 30, 1971, President Park wrote to Dr. Gassner that Gassner's letter withholding recommendation of tenure for Dr. Chung (C-37) was unsatisfactory, and Park said: "I am afraid that if it stands we might as well concede tenure." (C-38).

53. Acting on the recommendation of Defendant Gassner and Defendant Schmitz, Defendant Park informed Plaintiff on December 6, 1971, that he would recommend to the Board of Trustees that Plaintiff not receive tenure and cited the following reasons:

> "(1) The recommendations of those most knowledgeable about your teaching and you contribution as a member of the department of biology do not support granting you a continuing appointment except under conditions which the administration finds incompatible with the staffing needs of the College and the department.
>
> "(2) There is significant concern among students in your classes about the quality of your teaching.
>
> "(3) Because of the problems with your teaching, the department's ability to assign you to your full share of teaching responsibilities is impaired.
>
> "(4) You did not accept the concerns expressed by the administration about your teaching and you took actions which in effect kept the chairman and your department colleagues from fully identifying and resolving the problems." (R-20; C-37; C-39; C-36).

54. The Board of Trustees approved the President's action in declining to employ Plaintiff for 1972-1973. (Complaint, ¶ 23; Answer, ¶ 9).

55. Plaintiff understood throughout his last two years at the College that his probationary status had been extended in order to evaluate further his teaching. (Tr. Vol. 1, p. 153; R-15; R-10; C-52; Vol. 3, pp. 99, 96-97; Cross reference to paragraphs 27, 28, 39, 40, 41, 42, *supra*).

56. The Tenure Policy of Mansfield State College, as set forth in the Tenure Policy then in effect and applicable to the Plaintiff in § 3 states:

> "On appointment, a new faculty member will be informed that after the probationary period of three years or less, if so specified, he may be eligible for continuous employment. Upon accepting a position (unless specified as temporary and/or for less than a period of one academic year) the faculty member shall receive an appointment for one year, which may be renewed for the remainder of the probationary period. Appointments involving less than three years of probationary status must be explicitly noted as to the period of probation in the approval by the Board of Trustees."

57. Section 4 of the Tenure Policy states:

> "During the probationary period the President of the College shall inform the faculty member on or before March 15 whether his services will be required for the following academic year, September to May, inclusive. The faculty member shall indicate in writing his acceptance or rejection of the appointment within thirty calendar days."

58. Section 5 of the Tenure Policy states:

> "If the college administration does not desire to place a faculty member under continuous employment, the administration shall so notify the faculty member in writing at least by March 15 of the final year of probationary appointment, unless the President of the college sets up specific requirements to be met by the faculty member on a yearly basis, subject to review at the end of each semester. Such continuance of year-to-year employment shall not exceed two years." (Tr. Vol. 1, p. 48).

59. Section 6 of the Tenure Policy states:

"After the expiration of the probationary period of three (3) years a faculty member may have continuous employment subject to the retirement policy of the college."

60. Section 7 of the Tenure Policy states:

"The only valid causes for termination of his services shall be physical or mental disability, insobriety, immorality, when they seriously interfere with the discharge of his duties; incompetency, willful and persistent neglect of duty, or participation in treasonable activities as defined in Article 3, Section 3 of the United States Constitution."

61. President Park's letter to Plaintiff dated January 12, 1970 (¶ 25 above) did not set forth specific requirements to be met by Plaintiff. (Tr. Vol. 3, pp. 151 and 160).

62. Under college practice, the decision to grant tenure was announced by an affirmative letter from the President to the professor. (Tr. Vol. 3, p. 126).

II. Discussion

The interest in continuous employment acquired by a teacher working at a state college has been discussed by this Court in Moan v. Oswald, Civil No. 73-290 (M. D. Pa., filed August 23, 1973); and Skehan v. Board of Trustees of Bloomsburg State College, 353 F. Supp. 542; 358 F. Supp. 430 (M. D. Pa. 1973). See also Berry v. Hamblin, 356 F. Supp. 306 (M. D. Pa. 1973). These cases follow the principles set forth in the two recent Supreme Court opinions of Board of Regents v. Roth, 408 U. S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) and Perry

v. Sinderman, 408 U. S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972) (hereinafter referred to as Roth and Sindermann respectively).

A teacher employed by a college or university acting under color of state law has the right to a due process hearing upon dismissal from his position when he has gained tenure or the equivalence of tenure. See Roth and Sindermann, also, Comment, Due Process Rights of Nontenured Teachers—Nonrenewal of Contract, 77 Dick. L. Rev. 94 (1972).

Plaintiff maintains that according to the terms of the Tenure Policy, he obtained tenure after his three-year probationary period at Mansfield State College. The thrust of Defendants' defense is that the Plaintiff did not and could not have obtained tenure because he did not have an "objective expectancy" of continuous employment as he was well aware of his probationary status during his 4th and 5th years at Mansfield State. Hence, two separate inquiries are suggested: did Plaintiff become a tenured faculty member of the College by virtue of the Tenure Policy incorporated into his contract and, if not, did Chung become tenured because he had an "objective expectancy" of continuous employment arising out of the promises of certain College personnel?

Dr. Chung was employed under an informal contract. Dr. Chung's status depends on the interpretation to be given to the Mansfield State College Tenure Policy.

In deciding upon the proper construction of the Tenure Policy, state contract law is appropriate. Roth, 408 U. S. at p. 557, 92 S. Ct. 2701 and the concurring opinion of Chief Justice Burger in Sindermann, 408 U. S. at p. 604, 92 S. Ct. 2694.

Section 6 of the Tenure Policy states that the probationary period for faculty members is three years. Reading Sections 5 and 6 of the Tenure Policy together, Section

5 which I have previously described at a paradigm of turbidity, can be most sensibly interpreted in the following manner: After a three-year probationary period, a faculty member shall either be (1) released from duty, (2) given tenure, or (3) extended on probation for two more years if he be given specific requirements to be met on a yearly basis, subject to review at the end of each semester. Dr. Chung was not released from duty, the first category. He thus had to fall under the second or third categories.

Dr. Chung did not receive "specific requirements" to meet during his fourth and fifth years of probation. The Defendants believe that he should not prevail because:

> (1) the "concerns" expressed by the President of the College to Dr. Chung in the College's offer of fourth and fifth year probation to the Plaintiff fulfilled the "specific requirements" section of the Tenure Policy;
>
> (2) the Plaintiff knew or should have known that at no time up to and including his fifth year at Mansfield State did the College intend to grant him tenure;
>
> (3) the College had granted fourth and fifth year probation many times in the past without any faculty member demanding a "due process" hearing; and
>
> (4) the Plaintiff did cooperate in the evaluation of his teaching ability that could have led to a grant of tenure.

The "concern" related to Dr. Chung in the College's offer of fourth year probation was a "difficulty" some students were having with his "presentation through language barriers." The offer of fifth year probation was even more

vague; "the Chairman of the Department has expressed some concerns about your classroom teaching." The Court had extreme difficulty is understanding Dr. Chung's testimony at trial and recognizes that students must have been highly frustrated indeed during his lectures. However, the question before me is not whether Dr. Chung was a poor teacher but whether he obtained tenure.

"Specific requirements" to be met over a two-year period as prescribed by the tenure policy contemplate a set of goals which a faculty member must meet. The "concerns" expressed to Chung do not qualify as "specific requirements set up by the President." These comments are not adequate to satisfy the language of the Tenure Policy.

Dr. Chung never did agree to a fifth year of probation but asserted his contractural right to tenure. The proper remedy would have been for the College to dismiss Chung before the fourth or fifth year or to dismiss him during those years with an appropriate hearing.

The President of the College testified that fourth and fifth year probation had been granted many times in the past and no one had ever demanded a due process hearing. While custom and usage may reflect upon the interpretation of contract language, they cannot be utilized to abrogate the terms of a written contract provision. "A loose, variable custom or discretionary practice does not arise to the dignity of a custom so as to control the rights of the parties to a contract." Shipley et al. v. Pittsburgh and L. E. R. Co., 83 F. Supp. 722, 749 (W. D. Pa. 1949). Furthermore, there was no evidence of how similar or dissimilar any of the other fourth-fifth year probation cases were to Dr. Chung's.

The college officials argue that they could not evaluate Chung because he refused to permit his superiors to visit his classes. However, the Defendants did not try

to develop student evaluations for Dr. Chung and closely to scrutinize his teaching effectiveness until after the beginning of his fourth year at Mansfield State College. By this time it was too late since the aborted evaluation was not tied in to "specific requirements" as contractually mandated.

This case will be set on the March 4 trial list so that I may decide the second issue relating to the adequacy of the hearing afforded Dr. In-Cho Chung.

IV. Conclusions of Law.

1. The Court has jurisdiction of this action.

2. Defendant Board of Trustees is charged by the laws of the Commonwealth of Pennsylvania with the operation and direction of Mansfield State College.

3. Section 6 of the Pa. Public School Code, 1970, Feb. 17, P. L. —, No. 13, 24 P. S. § 20-2004.1 gives the President of Mansfield State College the power:

> "(14) To establish rules regarding employment rights, promotions, dismissals and tenure of faculty and other employes, subject to the approval of the Board of Trustees and in accordance with broad policies established by the Board of State College and University Directors."

4. According to the Tenure Policy of Mansfield State College applicable to Dr. Chung, the college was required to provide reasons for termination and a hearing to tenured faculty.

5. If probation were extended beyond the third year, the college was required to provide the Plaintiff with "specific requirements to be met by the faculty member . . . ."

6. The Tenure Policy became part of Plaintiff's contract of employment with the College.

7. The 14th Amendment to the federal Constitution protects a property interest in continuous employment.

8. The College did not provide Plaintiff with "specific requirements to be met by" him during the fourth or fifth years of his employment.

9. Plaintiff's employment status after the third year probation appointment was that of a tenured professor or employee.

10. It is necessary to decide whether the hearing provided Plaintiff by the College was adequate.

An appropriate order will be entered.

IN-CHO CHUNG,

Plaintiff,

v.

LAWRENCE PARK, INDIVIDUALLY AND AS PRESIDENT OF MANSFIELD STATE COLLEGE, ET AL.,

Defendants.

Civ. No. 73-371.

United States District Court,
M. D. Pennsylvania.

June 21, 1974.

Martin M. Fine, Williamsport, Pa., for plaintiff.

Robert Nagel, Deputy Atty. Gen., Harrisburg, Pa., for defendants.

Opinion.

MUIR, *District Judge.*

I. INTRODUCTION.

This civil rights action pursuant to 42 U. S. C. § 1983 was instituted by a college professor at Mansfield State College who alleged that his constitutional rights had been violated when his employment was terminated at the school. In a decision earlier this year, Chung v. Park, 369 F. Supp. 959 (M. D. Pa. 1974), the Court held that Plaintiff In-Cho Chung was entitled to tenure under the College's tenure policy. The Court then heard evidence on the issue of whether Dr. Chung received "due process" under the Fourteenth Amendment to the Federal Constitution in the proceedings which led to his discharge.

The Faculty Handbook sets forth the procedures to be utilized by the College in dismissing a tenured faculty member. The state claims that it is immune from that part of Plaintiff's claim which is based upon the embellishments to his federal constitutional rights contained in the Faculty Handbook. The Commonwealth made a motion for summary judgment on the immunity ground at the time of trial. It will be denied. The Commonwealth also asserts that when Chung accepted the type of hearing which had been worked out by his attorney with the attorney for the Commonwealth, he waived his right to the type of hearing which was prescribed by the Faculty Handbook. In any event, the Commonwealth claims that the scope of the hearing received by Plaintiff was in all respects in conformity with the requirements of the "due process" clause of the Constitution.

II. Findings of Fact.

1. The Court reaffirms all findings of fact numbered 1 through 62 in its Opinion of January 30, 1974.

2. President Park's letter of December 6, 1971 listed the following reasons for Dr. Chung's termination:

> "(a) The recommendations of those most knowledgeable about your teaching and your contribution as a member of the Department of Biology do not support granting you a continuing appointment except under conditions which the administration finds incompatible with the staffing needs of the college and the Department.
>
> "(b) There is significant concern among students in your classes about the quality of your teaching.
>
> "(c) Because of the problems with your teaching, the Department's ability to assign you to your full share of teaching responsibilities is impaired.

"(d) You did not accept the concerns expressed by the administration about your teaching and you took actions which in effect kept the chairman and your department colleagues from fully identifying and resolving the problems."

(R-20; Finding of Fact #53, Court's Opinion of January 30, 1974)

3. The reasons outlined in ¶ 2 were rendered more specific by the presentation to Dr. Chung of detailed documents prior to the effective date of the termination of his employment at Mansfield State College and prior to the date of his hearing. (Exhibits D-3, C-40, R-17, R-18, R-19, R-20)

4. An administrative hearing lasting eight trial days between April 10, 1972 and May 25, 1972 was provided Dr. Chung at the College before the completion of his fifth year of employment. (Hearing panel transcript, Vols. 1 through 8)

5. The first sentence of the opinion rendered by the hearing panel states the genesis and purpose of the panel hearing: "This panel was convened with the joint approval of Edgar R. Casper, Deputy Attorney General, Mansfield State College, Dr. In-Cho Chung and his counsel, Mr. Thomas A. Walrath, Esq., with the understanding that the panel would conduct a public hearing in the nature of a due process hearing to afford Dr. In-Cho Chung an opportunity to hear and present evidence which might be material, relevant, and competent on the issue as hereinafter defined." (Exhibit P-1, p. 1)

6. The parties stipulated at the hearing that "the nature of this hearing is a public hearing designed to afford Dr. Chung the opportunity to hear and have detailed for him whatever evidence there might be which in-

fluenced or guided Dr. Lawrence Park in his decision of December 6, 1971, not to grant continuing employment status to Dr. Chung, and to afford Dr. Chung, through counsel, to follow through with any evidence that he deems necessary to show that decision was arbitrary, capricious, or discriminatory." (Stipulation in trial transcript, Vol. 1, pp. 36-37)

7. Mr. Walrath, counsel for Dr. Chung, and the Attorney General's office agreed to the following procedural rules for the hearing:

(a) The hearing would be public.

(b) Admissibility of evidence would be within the discretion of the panel chairman subject to general considerations of relevancy and materiality.

(c) A written transcript would be kept.

(d) Both parties would present written evidence or oral testimony and would have the right to cross-examine.

(e) Both parties would be represented by counsel.

(f) The panel would submit a written statement of its findings of fact and conclusions.

(g) The complainant would have the right to appeal the decision of the hearing panel pursuant to the Pennsylvania Administrative Agency Law, 71 P. S. § 1701.1 et seq.

(h) The production burden would rest on the complainant to establish a prima facie case of arbitrariness, caprice, or discrimination.

(i) The College would be required to present written evidence to support its decision after the complainant established its prima facie case.

(j) The persuasion burden would rest on the complainant to establish his case by a preponderance of the evidence.

(Exhibits D-4, D-5, D-6)

8. Counsel for Dr. Chung and the College agreed that the issue for the hearing panel would be: "Was the action taken by the administration of Mansfield State College on December 6, 1971 not to grant continuing employment status to the complainant, arbitrary, capricious, or discriminatory?" (Exhibits D-5, D-6; Plaintiff's admissions 2(e))

9. Counsel for both parties agreed to the announced scope of the hearing and understand that the issue would be a factual issue and would exclude the legal issue as to whether Dr. Chung had a contract right to tenure upon completion of his third year of employment. (Exhibits D-4, D-5, D-6)

10. No objection and no comment were made by either party after the chairman of the hearing panel summarized the body's purpose, despite an invitation to do so by the panel chairman. (Hearing transcript, Vol. 1, pp. 7 through 8)

11. The hearing panel did not find the evidence to be in equipoise; instead, the hearing panel found:

"(a) The evidence in this proceeding *clearly* supports the conclusions that the reasons stated in Dr. Park's letter of December 6, 1971 . . . have factual bases.

"(b) Dr. Chung has . . . *utterly failed* to introduce evidence indicating any bias, prejudice, or discrimination against him by Dr. Park or any other member of the faculty or administration of the College.

"(c) In fact, the record *clearly* indicates that many associated with the College went to extreme lengths to determine and define the nature of his teaching abilities and to seek solutions for same, but that Dr. Chung's lack of cooperation became more firmly polarized as time went on, so that it became rather obvious that the interests of the institution, in the sense of performing its duties and obligations towards the students, left Dr. Park with only one choice."

(Emphasis added) (Exhibit R-20-B)

12. The administrative hearing panel was composed of three unbiased individuals, including one attorney and two professors who taught at colleges other than Mansfield State College. Dr. Chung's counsel prior to the hearing agreed that the hearing panel would be composed of three individuals. (Plaintiff's Admissions 2(a))

13. The chairman of the hearing panel was a local attorney, well known for his honesty, fairness, and competency. (Exhibit D-4)

14. Dr. Chung was vigorously represented at his hearing by an attorney who, as indicated by ¶ 7 above was permitted fully to cross-examine witnesses, to challenge evidence presented by the college, and to present his own witnesses in support of Dr. Chung's position. (Hearing transcript, Vols. 1-8)

15. As agreed, a transcript of the hearing was recorded and provided to Dr. Chung. (Hearing transcript, Vols. 1 through 8)

16. At the hearing, Dr. Chung's counsel introduced evidence in support of Chung's allegations that the procedures used to evaluate Dr. Chung for tenure were irregu-

lar and unfair. (Hearing transcript, Vols. 1 through 8; Chung's proposed findings of fact to the hearing panel, C-45 and C-54; Exhibit A to Plaintiff's request for admissions)

17. The hearing panel chairman ruled that evidence introduced by Dr. Chung's attorney relating to alleged procedural irregularities was relevant only to the extent that it tended to prove that President Park's decision was not founded upon fact or was based on bias or prejudice. (Exhibit R-20-B; Hearing transcript, Vol. 1, pp. 5, 6, 104, 123; Vol. 4, pp. 53 through 55)

18. Aside from hearing evidence presented by both parties, the hearing panel received briefs and proposed findings of fact from the disputants. (Hearing panel transcript, Vols. 1 through 8)

19. The hearing and panel members wrote an opinion and found the facts enumerated in ¶ 11 above. (Exhibit R-20-B)

20. The Secretary of Education upheld the decision of the hearing panel. (Exhibit R-20-A)

21. Dr. Chung did not seek a review in the state courts of either the findings of the panel or the procedures utilized, although an appeal pursuant to the Pennsylvania Administrative Agency Law, 71 P. S. § 1701.1 et seq. was clearly contemplated, see ¶ 7(a) above. (Testimony of Thomas Walrath)

22. The College tenure policy permitted dismissal of a tenured professor *inter alia* for the following reasons: ". . . physical or mental disability . . . when they seriously interfere with the discharge of his duties; incompetency; wilful and persistent neglect of duty. . . ." (Exhibit R-21, ¶ 4)

23. Dr. Chung did not object to the type of hearing provided for him. (Plaintiff's amended answer to Defendants' interrogatories; Plaintiff's admission)

24. Dr. Chung did not request or demand that the procedures provided for in the Tenure Policy for termination of a tenured professor be utilized in his case, but instead through the negotiations of his attorney agreed to the hearing procedures that were followed. (¶'s 6, 7, 8, 9, 10, 12 above)

25. According to the College Tenure Policy, the responsibility for requesting that the hearing procedures for probationary professors be employed was the responsibility of the aggrieved faculty member. The Tenure Policy stated: "12. If the faculty member wishes to contest this decision, *he may request the president to present the case to an appeal committee of the* faculty. . . ." (Emphasis added) (Exhibit R-21, ¶ 10)

26. Under the Tenure Policy, any appeal was contingent upon the aggrieved faculty members' decision to appeal and was not automatic. (Exhibit R-21, ¶ 13)

III. Discussion.

This Court has held that Dr. Chung had tenure. The College Tenure Policy governing tenured college professors at Mansfield State College explains in some detail the nature of the "due process" hearing to be afforded tenured professors upon dismissal. For example, § 10 of the faculty handbook provides that prior to the dismissal of the tenured faculty member, the individual be given an opportunity to correct his deficiencies.

There is some question whether the college has followed the precise procedures outlined in the faculty handbook; however, the Commonwealth asserts that neverthe-

less Chung is not entitled to relief for two reasons. First, subsequent to the trial of this action, the Commonwealth has raised the question of sovereign immunity, and second, the Commonwealth asserts that Dr. Chung has waived whatever hearing rights a tenured faculty member is entitled to pursuant to the Faculty Handbook over and above what he actually received. On the first issue, the Court is of the view that the immunity defense cannot now be utilized by the Commonwealth but as to the "waiver issue," the Court does find that Chung has waived whatever additional rights he might have been entitled to under the Faculty Handbook.

The defense of sovereign immunity can be waived by a general appearance and litigation in federal court. Skehan v. Board of Trustees of Bloomsburg State College et al., 501 F. 2d 31 (3d Cir. 1974). The Court had no hint that the Commonwealth would raise this defense until the receipt of a letter dated March 27, 1974 by Deputy Attorney General Robert F. Nagel several days before the hearing. No evidence was introduced on this issue at trial and legal argument will not be entertained at this time.

As the findings of fact disclose, there can be no question but that Dr. Chung received a hearing which comported with the bare minima of "due process." See Morrissey v. Brewer, 408 U. S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). To reiterate the findings of fact somewhat, Dr. Chung received an eight-day hearing during which he was fully able to cross-examine his accusers, subpoena witnesses, present evidence, and in effect, demand a full accounting from the college as to whether the decision of President Park to fire him was supported. No interest in liberty, such as free speech, is involved. See Board of Regents v. Roth, 408 U. S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); Perry v. Sindermann, 408 U. S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972).

The College dismissed Dr. Chung for incompetence and intransigence with respect to his dealings with his superiors, both being reasons for dismissal of a tenured faculty member. The hearing panel after an exhaustive hearing clearly found that Dr. Park's reasons for dismissal of Dr. Chung were indeed motivated by the two factors noted, intransigence and incompetence.

It is hornbook law that contractual provisions can be waived, expressly or impliedly. 8 P. L. E., Contracts § 300. Through the process of negotiation, Dr. Chung made the conscious choice of obtaining a "due process" hearing which had some procedural aspects which were different from those employed in a normal tenure revocation proceeding. Perhaps the most important difference between the hearing afforded Dr. Chung and the hearing usually afforded tenured professors was that the burden of proof rested upon Dr. Chung's shoulders. However, a careful reading of all the materials surrounding the hearing afforded Dr. Chung has convinced this Court that the College came forward with all the evidence necessary to establish Dr. Chung's lack of competency and that Dr. Chung had the opportunity to refute all the evidence presented.

The hearing in this case was held prior to the effective date of Dr. Chung's termination of employment. Compare Perry v. Sindermann, *supra*, with Arnett v. Kennedy et al., 416 U. S. 134, 94 S. Ct. 1633, 40 L. Ed. 2d 15, decided April 16, 1974, where it was stated "since the purpose of the hearing in such a case is to provide the person 'an opportunity to clear his name,' a hearing afforded by administrative appeal procedures after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause."

IV. Conclusions of Law.

1. The "due process" hearing afforded Dr. Chung gave him a complete opportunity to challenge the sufficiency and accuracy of the reasons given for his termination, such as bias, prejudice or other improper motivation.

2. The placement of the burden of production of the evidence on Dr. Chung did not deprive Chung of "due process" as the College came forward with substantial evidence to support Dr. Chung's termination and as Dr. Chung was given the opportunity to rebut that evidence.

3. Neither the evidentiary rulings nor the manner in which the "due process" hearing was operated denied to Dr. Chung "due process" of law.

4. Dr. Chung by agreeing to the hearing and participating fully in it waived objection to the differences in the hearing granted him versus the hearing to which tenured faculty members were entitled.

5. The conclusion of the hearing panel would have supported the termination of a tenured professor at Mansfield State College.

6. The conduct of the hearing provided Dr. Chung was in substantial compliance with the College Tenure Policy.

7. Mansfield State College waived any defense of sovereign immunity by not pleading and attempting to prove it either pre-trial or during the course of the trial.

8. There was no breach of contract by Mansfield State College in failing to follow the precise procedures of the Faculty Handbook as Dr. Chung did not request that those procedures be followed in his case.

An appropriate order will be entered.

IN-CHO CHUNG,
Appellant in No. 74-1875,

v.

LAWRENCE PARK, INDIVIDUALLY AND AS PRESIDENT OF MANSFIELD STATE COLLEGE, ET AL.,
Appellants in No. 74-1876.

Nos. 74-1875, 74-1876.

United States Court of Appeals,
Third Circuit.

Argued March 3, 1975.

Decided April 11, 1975.

Martin M. Fine, Fine, Eisenbeis & Felix, Williamsport, Pa., for appellant in No. 74-1875 and cross-appellee in No. 74-1876.

Robert F. Nagel, Deputy Atty. Gen., Commonwealth of Pennsylvania, Harrisburg, Pa., for appellees in No. 74-1875 and cross-appellants in No. 74-1876.

Before ADAMS, ROSENN and WEIS, Circuit Judges.

Opinion of the Court.

ADAMS, *Circuit Judge.*

The principal issue on this appeal is whether Dr. In-Cho Chung, a professor at Mansfield State College, was denied procedural due process when his employment was terminated (1) without his being afforded a hearing prior to the decision by the administration that termination was warranted, and (2) by imposing the burden of proof

on Dr. Chung, in the hearing that was afforded, to show that the decision to terminate was unreasonable, arbitrary or capricious.

Dr. Chung was employed as a biology professor at Mansfield State College for five academic years, between September 1967 and June 1972. Before the end of each year he was offered and accepted a position for the following year.[1] On December 6, 1971, Dr. Park, the president of the college, recommended to the board of trustees that Dr. Chung's contract not be renewed for the 1972 school year, and notified Dr. Chung of the following reasons for the decision:

1. Those most knowledgeable about Dr. Chung's teaching record and his contributions to the biology department had not given him favorable recommendations;

2. There was significant concern among the students about the quality of Dr. Chung's teaching;

3. The department could not assign him his full share of teaching responsibilities; and

4. Dr. Chung had refused to cooperate with the department and his colleagues in efforts to identify and resolve the above problems.

After receiving notification of termination, Dr. Chung, through counsel, negotiated with the State Attorney General's Office and eventually agreed to submit the issue of the validity of his termination to a neutral arbitration panel. Detailed specifications for the hearing were agreed

1. On January 12, 1970, the president of the college offered a fourth probationary year to Dr. Chung, but notified him that some students had complained they had difficulty understanding him; that there were disappointingly small enrollments in his classes; and that a tenure decision was being delayed because a new chairman was being appointed for the biology department.

upon by counsel for Dr. Chung and the Attorney General's Office.[2]

Prior to the hearing Dr. Chung was more fully notified of the reasons for his termination when he was provided with copies of all documents relied on by the college in reaching its decision to terminate.

It was explicitly agreed by Chung's attorney and the Attorney General that the issue before the arbitration panel would be: "Was the action taken by the administration at Mansfield State College on December 6, 1971 not to grant continuing employment status to the complainant, arbitrary, capricious, or discriminatory?"

The hearing panel was composed of three individuals whose impartiality has not been questioned, including two professors teaching at colleges other than Mansfield and a local attorney who served as chairman. Dr. Chung was vigorously represented at the hearing by counsel, who was

2. The agreed specifications provided that:

(a) The hearing would be public.

(b) Admissibility of evidence would be within the discretion of the panel chairman subject to general considerations or relevancy and materiality.

(c) A written transcript would be kept.

(d) Both parties would present written evidence or oral testimony and would have the right to cross-examine.

(e) Both parties would be represented by counsel.

(f) The panel would submit a written statement of its findings of fact and conclusions.

(g) The complainant would have the right to appeal the decision of the hearing panel pursuant to the Pennsylvania Administrative Agency Law, 71 P. S. § 1710.1 et seq.

(h) The initial burden would rest on the complainant to establish a prima facie case of arbitariness, caprice, or discrimination.

(i) The college would be required to present written evidence to support its decision after the complainant established his prima facie case.

(j) The burden of persuasion would rest on the complainant to establish his case by a preponderance of the evidence.

permitted to cross-examine the adverse witnesses, to challenge evidence presented by the college, and to present any written evidence or oral testimony he wished. A transcript of the eight-day hearing was prepared and provided to Dr. Chung. After presentation of the evidence the panel received briefs and proposed findings of fact, and then wrote an opinion.

The panel found, in substance, that: (1) the evidence clearly supported the conclusion that the reasons stated in the President's letter had factual bases; (2) Dr. Chung had failed to produce evidence indicating any bias, prejudice, or discrimination against him; and (3) the record clearly indicated that many persons associated with the college went to extreme lengths to identify and seek solutions for Dr. Chung's teaching problems, but that Dr. Chung's lack of cooperation intensified as time went on so that Dr. Park had only one choice—to discharge the plaintiff.

Dr. Chung sought review of the panel's decision in the District Court for the Middle District of Pennsylvania.[3] The district court held that Dr. Chung had gained tenure after his third year of employment, but that the hearing provided to Dr. Chung fully satisfied the college's tenure regulations and the requirements of due process.[4] Accordingly, the district court entered judgment for defendants.

On appeal Dr. Chung contends (1) that the procedures followed by the college in terminating his employ-

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3. Although Dr. Chung did not seek review in the Pennsylvania Court of Common Pleas, he could have done so pursuant to the Pennsylvania Administrative Agency Law, Pa. Stat. Ann., tit. 71, § 1710.1 et seq. Indeed, his agreement with the Attorney General specifically so provided.

4. Pennsylvania law is controlling on the contract issue, which was within the pendent jurisdiction of the district court. *See* United Mine Workers v. Gibbs, 383 U. S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966).

ment did not accord with those outlined in the college tenure regulations, and that such irregularity constituted a breach of his contract; and (2) that he was denied due process by the procedure followed by the college.

The Commonwealth filed a cross-appeal, contending that the district court erred in holding that Dr. Chung had tenure and in failing to hold that the defendant had a valid defense of sovoreign immunity.

A. DR. CHUNG'S CONTRACTUAL RIGHTS.

Even assuming, arguendo, that Dr. Chung did have tenure and was contractually entitled to a hearing which scrupulously complied with the procedures outlined in the college tenure regulations, we cannot say that the district court erred in finding that Dr. Chung waived any contractual rights to which he was entitled. Under Pennsylvania law, contractual rights may be waived by a subsequent agreement between the parties. Betterman v. American Stores Co., 367 Pa. 193, 80 A. 2d 66, cert. denied 342 U. S. 827, 72 S. Ct. 49, 96 L. Ed. 625 (1951). The district court's finding that the parties had reached such a subsequent agreement when, after extensive negotiations, they specifically stipulated to the hearing procedures actually employed, is not clearly erroneous.[5] In any event, the district court found, as a fact, that the hearing satisfied the college's tenure regulation.

B. DR. CHUNG'S DUE PROCESS RIGHTS.

Dr. Chung's principal contention on appeal is that the hearing before the arbitration panel failed to satisfy

5. *See* Fed. R. Civ. P. 52(a).

the requirements of due process.[6] The Supreme Court has indicated that in pre-termination hearings,[7] such as the one provided in this case, the person being deprived of his "property interest" is entitled to minimum procedural safeguards which are adapted to the particular characteristics of the interests involved and the limited nature of the controversy. These safeguards may include: (1) written notice of the grounds for termination; (2) disclosure of the evidence supporting terminating; (3) the right to confront and cross-examine adverse witnesses; (4) an opportunity to be heard in person and to present witnesses and documentary evidence; (5) a neutral and detached hearing body; and (6) a written statement by the fact finders as to the evidence relied upon. *See* Morrisey v. Brewer, 408 U. S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972); Goldv. Kelly, 397 U. S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970).

Whether or not Dr. Chung was entitled, under the circumstances here, to this panoply of protective devices, he was, in fact, afforded all of these safeguards in his termination hearing. He argues, however, that he is en-

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6. In deciding the due process claim, we assume, without deciding, that Dr. Chung had tenure. Although courts traditionally avoid constitutional questions whenever possible, resolution of the state contract law question here would not enable us to avoid deciding a constitutional question, for even were we to determine that Dr. Chung did not have tenure, we would nevertheless still have to address the difficult constitutional question—not briefed by the parties—whether Dr. Chung had an expectancy of continued employment which amounted to a sufficient property interest to entitle him to procedural due process protection. *See* Perry v. Sindermann, 408 U. S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972).

7. A pre-termination hearing is not a hearing held prior to any decision to terminate, as Dr. Chung suggests, but rather a hearing held prior to a termination of benefits. *See* Goldberg v. Kelly, 397 U. S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970). In the present case, any hearing held prior to the end of the academic year would be a pre-termination hearing.

titled to more protection than these procedures provided him, under the concept that a hearing must be held at a meaningful time and in a meaningful manner in order to satisfy due process. Armstrong v. Manzo, 380 U. S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965).

More particularly, Dr. Chung asserts that the college made the decision to terminate before giving him a hearing and then placed the burden of proof on him to show that the decision of the administration to terminate was arbitrary, capricious or discriminatory. This procedure, Dr. Chung contends, does not comport with due process according to the rule of Goldberg v. Kelly, 397 U. S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970). He would have us hold that due process in the present case required that a hearing be held before any decision to terminate was reached by the administration, and that the burden of proof at such a hearing should have been on the administration to show that the decision to terminate was justified.

Due process does not impose such strictures on professorial pre-termination proceedings. Unlike some legal rules, due process is protean in nature. The determination of what process is due depends on appropriate accommodation of the competing interests involved. Goss v. Lopez, — U. S. —, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975); Cafeteria Workers v. McElroy, 367 U. S. 886, 895, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961).

Thus, we must here weigh the professor's interest in avoiding an unreasonable termination against the college's interest in having an efficient process for identifying and ridding itself of incompetent faculty members. In accommodating these interests we are cognizant of the Supreme Court's admonition that:

> Judicial interposition in the operation of the public school system of the Nation raises problems requir-

> ing care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities.

Epperson v. Arkansas, 393 U. S. 97, 104, 89 S. Ct. 266, 270, 21 L. Ed. 228 (1968).

To determine what process is due we have reviewed the guidelines enunciated in Morrisey v. Brewer, 408 U. S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) and Goldberg v. Kelly, 397 U. S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970), but have found nothing in these cases which suggests that Dr. Chung was entitled to have a hearing prior to a decision by the college to terminate, or to have the college bear the burden of proof at the hearing that was actually held after the decision to terminate.

Indeed, Perry v. Sindermann, 408 U. S. 593, 603, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972), states that the function of the hearing procedure is to inform the professor of the grounds for his non-retention and to allow him to challenge their sufficiency. Thus *Sindermann* suggests that a *post-decision* hearing in which a professor has the burden of proof is adequate to satisfy due process. Moreover, the administration of the internal affairs of a college and especially the determination of professional competency is a matter peculiarly within the discretion of a college administration.

Due process should not be employed to insure that this exercise of discretion is "wise" but only that it is not unreasonable, arbitrary or capricious.[8] If the procedure

8. We recognize that in some situations the standard of review employed here might be inadequate. *See, e.g.*, Morrisey v. Brewer, 408 U. S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972); Goldberg v. Kelly, 297 U. S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970). Those situations, however, are distinguishable from the present case, because they involved a different type of interest and a different type of decision making. Here we are not dealing with a decision whether Dr. Chung satisfied a specific set of statutory or

used by the college is adequate to prevent unreasonable, arbitrary or capricious termination decisions, it satisfies due process.[9] The procedure used in this case was sufficient for these purposes.[10] Dr. Chung was fully informed of the grounds for his termination prior to the hearing, and had a full opportunity to prove to a neutral arbitration panel that the termination was unreasonable, arbitrary or capricious, but failed to do so.

Accordingly, the judgment of the district court will be affirmed.[11]

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8. (Cont'd.)
administrative conditions which would have entitled him to continuing employment. Rather, we are concerned with an exercise of discretion by the college administration as to whether Dr. Chung was competent to perform the duties of a professor. By its nature this type of decision cannot be adjudged as correct or erroneous, but only as reasonable or unreasonable. Moreover, Dr. Chung's property interest here would not seem to be of the same critical magnitude as the liberty involved in *Morrisey* or the sole available means of subsistence involved in *Goldberg*. The difference in the nature of the interests implicated affects the procedural requisites for the hearing. Boddie v. Connecticut, 401 U. S. 371, 378, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971).

9. Johnson v. Board of Regents, 377 F. Supp. 227, 239 (W. D. Wis. 1974); *see* Moynahan Properties, Inc. v. Lancaster Village Cooperative, Inc., 496 F. 2d 1114, 1118 (7th Cir. 1974).

10. The district court also determined that "the conclusion of the hearing panel would have supported the termination of a tenured-professor at Mansfield State College."

11. The district court held that the appellees, by their general appearance waived the defense of sovereign immunity, in light of our decision we do not reach the waiver issue.

APPENDIX B.

Statutes Involved.

TITLE 42.

CIVIL ACTION FOR DEPRIVATION OF RIGHTS.

§ 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (RS § 1979.)

From Act Apr. 20, 1871, c. 22, § 1, 17 Stat. 13.

CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS.

§ 1985. First. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Second. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat,

any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Third. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of con-

spiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. (RS § 1980.)

From Act July 31, 1861, c. 33, 12 Stat. 284; April 20, 1871, c. 22, § 2, 17 Stat. 13.

APPENDIX C.

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(Letterhead of)

MANSFIELD STATE COLLEGE
MANSFIELD, PENNSYLVANIA 16933
717 662-2114

[Seal of the Commonwealth of Pennsylvania]

Office of the President

December 6, 1971

Dr. In-Cho Chung
R. D. #1
Mansfield, Pennsylvania

Dear Dr. Chung:

This letter is to inform you that your faculty appointment for 1972-73 with continuing status will not be recommended to the Board of Trustees.

The decision to not grant you continuing employment status was made for the following reasons:

1. The recommendations of those most knowledgeable about your teaching and your contribution as a member of the department of biology do not support granting you a continuing appointment except under conditions which the administration finds incompatible with the staffing needs of the College and the department.

2. There is significant concern among students in your classes about the quality of your teaching.

3. Because of the problems with your teaching, the department's ability to assign you to your full share of teaching responsibilities is impaired.

4. You did not accept the concerns expressed by the administration about your teaching and you took actions which in effect kept the chairman and your department colleagues from fully identifying and resolving the problems.

If you desire a hearing to discuss the above decision and/or related questions please advise me.

Yours truly,

LAWRENCE PARK
Lawrence Park
President

APPENDIX D.

Duvall Panel Report.

OPINION.

This Panel was convened with the joint approval of Edgar R. Casper, Deputy Attorney General, Mansfield State College, Dr. In-Cho Chung and his counsel Mr. Thomas A. Walrath, Esquire with the understanding that the Panel would conduct a public hearing in the nature of a due process hearing to afford Dr. In-Cho Chung an opportunity to hear and present evidence which might be material, relevant and competent on the issue as hereinafter defined.

At the inception of the hearing it was clearly stated that strict rules of evidence would not be applied, but that an effort would be made to restrict testimony and offers to those meeting the tests of materiality and relevancy. It was further stated by the Panel that Dr. In-Cho Chung would have the burden of proof with respect to the issue involved.

The issue to be resolved by the Panel is and was defined as follows:

> Was the decision of Dr. Lawrence Park, President of Mansfield State College on December 6, 1971 not to grant continuing employment status to Dr. In-Cho Chung arbitrary, capricious, or discriminatory?

It was the interest and desire of the Panel to afford Dr. Chung as much latitude as possible to present his case. A large part of the record reflects unfairnesses and hardships suffered by Dr. Chung in the course of his period

of employment by the College which are admitted but not defended by the Administration and which are not relevant to the issue. As indicated, not only is Administration, but also the Panel regretful of many of the disappointments and unhappinesses visited upon Dr. Chung, it seems equally clear, however, that none of these experiences were visited upon Dr. Chung willfully by any of his colleagues or the members of the Administration of the College.

It is not necessary in this proceeding, as it would be under a "just cause" standard in a tenure revocation proceeding, to decide whether Dr. Park's decision was supported by preponderance of the evidence. If it were, the Panel would be required to evaluate many issues other than whether or not Dr. Park's stated reasons for denying continuing employment status were wholly without basis in fact. It is not for this Panel to resolve, on the basis of the evidence presented, whether or not it agreed with the decision of Dr. Park, but whether there was sufficient evidence upon which Dr. Park relied in reaching his decision with which a reasonable mind could agree. The evidence in this proceeding clearly supports the conclusion that the reasons stated in Dr. Park's letter of December 6, 1971 being Respondent's Exhibit 20 have factual bases. It is submitted that if any one of the four reasons set forth in Dr. Park's letter of December 6, 1971 was found to have a factual basis, that this alone would be a not wholly inappropriate reason for his decision. The function of this Panel is not to evaluate the evidence and determine whether it would have reached the same decision as Dr. Park, but rather to determine whether there had been such a lack of factual evidence to support his decision as to have constituted a denial of due process.

It is the concensus of the Panel that Dr. Chung has failed to meet the burden imposed on him in this hearing in that he has utterly failed to introduce evidence indicat-

ing any bias, prejudice or discrimination directed against him by Dr. Park or any other member of the faculty or Administration of the College. In fact, the record clearly indicates that many associated with the College went to extreme lengths to determine and define the nature of his teaching difficulties and seek a solution for same, but that Dr. Chung's lack of cooperation became more firmly polarized as time went on so that it became rather obvious that the interests of the institution, in the sense of performing its duties and obligations towards the students, left Dr. Park with only one choice.

Accordingly, it is the consensus of the Panel that Dr. Lawrence Park, President of the College had adequate grounds for reaching his decision of December 6, 1971 denying Dr. In Cho Chung continuing employment status and that Dr. Chung has failed to prove by a preponderance of the evidence that the decision of Dr. Park on December 6, 1971 was arbitrary, capricious or discriminatory.

/s/ A. B. DUVALL
A. B. Duvall

/s/ JAMES E. COLE
Dr. James E. Cole

/s/ MICHAEL PAYNE
Dr. Michael Payne